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No. 86-1600

In the Supreme Court of the United States

OCTOBER TERM, 1986

HERNAN BOTERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment requires a court, before admitting a co-conspirator declaration under Fed. R. Evid. 801(d)(2)(E), to make a separate determination that the declaration is reliable.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A113) is reported at 808 F.2d 59 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1986, and a petition for rehearing was denied on February 5, 1987 (Pet. App. A114). The petition for a writ of certiorari was filed on April 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; one count of falsifying material facts within the jurisdiction of a federal agency, in violation of 18 U.S.C. 1001; and five counts of mail

fraud, in violation of 18 U.S.C. 1341. Petitioner was sentenced to consecutive five-year terms of imprisonment on the first six counts, a concurrent five-year term of imprisonment on the final count, and a $25,000 fine. The court of appeals affirmed without opinion (Pet. App. A113).

1. Co-conspirator Delores Eirin was an officer of the Landmark First National Bank of Fort Lauderdale.[1] In October 1979, petitioner advised Eirin that he wished to make large deposits of cash at the bank without the bank's filing the required Currency Transaction Reports (CTR's) with the Internal Revenue Service. Eirin recruited co-conspirators Alan Campbell and Gary Dodson, both loan officers at the bank, to participate in the money laundering operation.

In December 1979, petitioner met with Campbell and Dodson and explained that he had a "product" originating in Colombia that he imported to the United States and sold for cash. Petitioner stated that he wanted the bank to convert that cash into Colombian pesos and to transfer it to Colombian banks without reporting the transactions to governmental authorities. Petitioner advised Campbell and Dodson that they could expect to handle about $400,000 in cash each banking day, and he promised them and Eirin 3/4 of one percent of the funds that they handled.

To facilitate the scheme, on December 31, 1979, petitioner opened five accounts at the bank in the names of fictitious customers. Over the next ten months, petitioner, working through a number of confederates, laundered more than $54 million through those five accounts. The pattern of operation throughout the period remained

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[1] The summary of the facts is based on the brief submitted by the government in the court of appeals. Petitioner does not challenge the sufficiency of the evidence.

much the same. Couriers would regularly arrive at the bank with suitcases, duffel bags, boxes, and briefcases containing large amounts of cash for deposit. After each deposit, Campbell, Dodson, or Eirin would prepare a CTR for the files (in order to mislead the bank) and would thereafter destroy the original copy instead of sending it to the Internal Revenue Service. They would then transfer the cash deposits to other banks by means of wire transfers or cashier's checks.

2. In May 1980, the volume of petitioner's deposits diminished appreciably. On several occasions, in fact, the principal courier, Lisardo Restrepo, arrived at the bank without any cash to deposit. When asked by Campbell, Dodson, or Eirin why the deposits were lagging, Restrepo replied that the Mariel boatlift had interfered with business and that one of petitioner's boats had been seized.

Defense counsel objected to the admission of Restrepo's statement, contending, in part, that even if the statement were admissible under Fed. R. Evid. 801(d)(2)(E), it was not sufficiently reliable to satisfy the Confrontation Clause (Pet. App. A38-A40). The district court rejected that claim (Pet. App. A89-A91), holding that because the declarant was unavailable and because the elements of Rule 801(d)(2)(E) had been met, there was no need for a further reliability inquiry under the Sixth Amendment. The court of appeals affirmed by judgment order without discussion of petitioner's Confrontation Clause claim (Pet. App. A-113).

ARGUMENT

Petitioner asks the Court to resolve a conflict among the circuits on whether the Confrontation Clause requires trial courts to conduct a separate reliability inquiry before admitting co-conspirator declarations that otherwise meet the requirements of Rule 801(d)(2)(E). The same question is now before the Court in *Bourjaily* v. *United States*,

cert. granted, No. 85-6725 (Oct. 14, 1986). As we contend in our brief on the merits (at 27-42) in *Bourjaily*,[2] the Confrontation Clause does not require that statements admissible under Rule 801(d)(2)(E) be separately screened for reliability. First, a co-conspirator statement admissible under Rule 801(d)(2)(E) falls within a "firmly rooted hearsay exception" and, under *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980), it is for that reason sufficiently reliable to satisfy the Confrontation Clause. Second, the prerequisites of Rule 801(d)(2)(E) ensure sufficient reliability to warrant submitting admissible co-conspirator statements to the jury.

Since the issue is currently before the Court in the *Bourjaily* case, the Court may wish to defer disposition of petitioner's case until it has decided *Bourjaily*.

CONCLUSION

The petition for a writ of certiorari should be held pending the resolution in *Bourjaily* and disposed of in light of the decision in that case.

Respectfully submitted.

CHARLES FRIED
Solicitor General

MAY 1987

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[2] We are furnishing a copy of our brief in *Bourjaily* to petitioner's counsel.

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